No. 98-1748

(3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

ELLIS W. LAY, individually and d/b/a WINTERGREEN NURSERIES, *et al.*,

Petitioners,

v.

E.I. DU PONT DE NEMOURS and COMPANY, a Delaware Corporation; and ALSTON & BIRD, a Georgia Partnership,

Respondents.

and

WARREN KOBATAKE, *et al.*,

Petitioners,

v.

E.I. DU PONT DE NEMOURS and COMPANY, a Delaware Corporation; and ALSTON & BIRD, a Georgia Partnership, including Professional Corporations,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, the Petitioners respectfully submit this Reply to Brief in Opposition.

ARGUMENT

THE ISSUES PRESERVED IN THIS MATTER ARE EXPEDIENT FOR REVIEW OF A SIGNIFICANT ISSUE CONCERNING THE INTERPLAY BETWEEN FEDERAL RULES OF CIVIL PROCEDURE AND SUBSTANTIVE STATE LAW

Respondents, E.I. du Pont de Nemours and Company and Alston & Bird, maintain (Opp. Cert. 1) that the question presented by Petitioners to this Court was not presented to the District Court and mentioned for the first time on appeal in a footnote in a reply brief. Petitioners briefed this issue regarding application of federal law to the subject releases in their first memorandum of law to the District Court opposing Respondents' motions to dismiss, relevant portions of which are reprinted in the Reply Appendix ("Reply App.") at 1. Both the District Court at footnote 3 on page 21 of the Petitioners' Appendix ("App.") and the Eleventh Circuit Court of Appeals (App. 7 n.3) declined to follow and apply federal law to the F.R.Civ.P. 60(b) claims asserted by Petitioners. More specifically, Petitioners again raised issues concerning application of federal law regarding F.R.Civ.P. 60(b) in their Petition for Rehearing and Suggestion for Rehearing *En Banc* (App. 33-63).

THE INDEPENDENT ACTION FOR EQUITABLE RELIEF PRESERVED BY RULE 60(B) INCLUDES PROTECTION FOR LITIGANTS

Without guidance from review by this Court, litigants in federal courts face unsettled questions of law emanating from the Eleventh Circuit's application of state substantive law to circumvent equitable safeguards preserved by the Federal Rules of Civil Procedure.

Respondents suggest that the District Court's resolution of the criminal contempt of court charges remanded by the Eleventh Circuit in *In re E.I. DuPont De Nemours & Company – Benlate Litigation*, 99 F.3d 363 (11th Cir. 1996) ("*Bush Ranch* II") should operate in some fashion to enervate Petitioners' independent action preserved by F.R.Civ.P. 60(b). While the District Court's Order in *Bush Ranch* II, dated December 31, 1998, (Reply App. 1-10) never mentions "fraud on the court" or F.R.Civ.P. 60(b), it implicitly recognizes an autonomous right protecting those affected by such fraud.

Armed with multipotent powers of civil and criminal contempt of court, the United States District Court has the right and power to remedy the damages the court suffered from the aftermath of a direct assault on the judicial process chronicled by the pleadings and record in this case. On the other hand, the relief provided in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), and preserved by F.R.Civ.P. 60(b), is the vehicle our federal judicial system provides to Petitioners to seek their

relief.[1] As litigants in federal court, the Petitioners' rights to equitable safeguards have parallel status to those wielded by the District Court. Petitioners' independent equitable claims preserved by F.R.Civ.P. 60(b) must operate to survive application of state law regarding releases.

THE EQUITABLE POWERS OF A COURT TO FASHION A REMEDY ARE LIMITED ONLY BY THE RELIEF NECESSARY TO CORRECT PARTICULAR INJUSTICES

Without regard to prior rulings on applicable substantive state law to claims released in settlement of the underlying action, a federal court ruling on an independent action for fraud on the court can fashion an equitable remedy in relation to the gravity of the harm. Respondents' characterization of the relief provided in *Hazel-Atlas* misapprehends the posture of the parties; the fraudfeasor, Hartford-Empire Co., was the plaintiff seeking relief in the underlying case. The *Hazel-Atlas* Court recognized that "[t]he total effect of all this fraud, . . . , calls for nothing less than a complete denial of relief" to

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[1] Petitioners candidly acknowledge that there may be a split of authority on whether affirmative relief is available under F.R.Civ.P. 60(b). Some courts have disclaimed such availability. *Adduono v. World Hockey Ass'n*, 824 F.2d 617 (8th Cir. 1987); *United States v. One Hundred Nineteen Thousand Nine Hundred Eighty Dollars ($119,980.00)*, 680 F.2d 106 (11th Cir. 1982); *United States v. One 1961 Red Chevrolet Impala Sedan, Serial No. 11837A177369*, 457 F.2d 1353 (5th Cir. 1972). Other courts, however, explicitly ruled that affirmative relief is available. *Conerly v. Flower*, 410 F.2d 941, 944 (8th Cir. 1969); *Kawamata Farms, Inc. v. United Agri Products*, 86 Hawai'i 214, 948 P.2d 1055, 1097 (1997).

the fraudfeasor-plaintiff. 322 U.S. at 250. The critical issue for this Court's review is whether state substantive law can interfere with the uniform operation of the Federal Rules of Civil Procedure. This Petition affords the Court the opportunity, also, to reaffirm the law well-settled in *Hazel-Atlas* (and it progeny) that F.R.Civ.P. 60(b) was:

> [c]reated to avert the evils of archaic rigidity, [so] this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.

322 U.S. at 248.

CONCLUSION

The Court's granting of a Petition of Certiorari in this matter is justified in order to provide federal litigants uniform equitable protections, preserved by the Federal Rules of Civil Procedure, without regard to diverse substantive state law.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF GEORGIA

ELLIS W. LAY, individually and d/b/a WINTERGREEN NURSERIES, et al., Plaintiffs, vs. E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation, et al., Defendants.	)	CIVIL ACTION NO. 1 96-CV 2303

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

(Filed Nov. 12, 1996)

I. INTRODUCTION

This case centers upon DUPONT and ALSTON & BIRD lying to, cheating and committing fraud on both plaintiffs and a United States District Court.[1] Several courts across the country have either established as matters of law and fact, or found prima facie evidence of, DUPONT abusing the federal court in Georgia for the purpose of defrauding Plaintiffs herein. DUPONTS's conduct was not inadvertent error, an honest mistake or even

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[1] As is their right under F.R.C.P. 15(a), the Plaintiffs have amended their Complaint, including adding a new party. Plaintiffs recognize that Defendants may want to file a motion directed to the Amended Complaint.

a reckless act. The Honorable J. Robert Elliott of the Middle District of Georgia found that DUPONT, with malice and forethought, "lied and cheated deliberately and with purpose. . . . " *See, In re: E.I. DuPont de Nemours and Company – Benlate Litigation*, 918 F.Supp. 1524, 1556 (M.D. Ga. 1995). The Eleventh Circuit Court of Appeals recognized the serious nature of this conduct and that the very conduct that is the subject matter herein would support a finding of criminal contempt. (Exhibit 1, p. 11). Simply put, this case is about fraud on the Court, and the Plaintiffs.[2] This is not only a wrong between the parties in the case; it involves a direct assault on the integrity of the judicial process. The law favors discovery and correction of corruption of the judicial process, even more than it requires an end to lawsuits. *Lockwood v. Bowles*, 46 F.R.D. 625 (D.C.D.C. 1969).

DUPONT now contends that it and its lawyers from ALSTON & BIRD should be allowed to get away with the criminal fraud chronicled by Judge Elliott and the Eleventh Circuit without compensating the victims of that fraud, that the law says they can and that, presumably, they were contemplating getting away with their criminally fraudulent behavior when they drafted releases for the litigants' signatures in the underlying action. DUPONT submits that this Federal Court will say there

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[2] The cause of action for spoilation [sic] of evidence has never been addressed by the Georgia courts, but is recognized in other courts, *e.g.*, *Williams v. State*, 664 P.2d 137 (Calif. 1983). There are also causes of action, *inter alia*, RICO, conspiracy, and unfair trade practices, all of which also survive the release for the same reasons set forth herein and because they were ongoing.

are no civil consequences for corporations and their lawyers who lie, cheat, and suborn perjury in the federal courts of the United States (as long as they are in Georgia) for the purposes of cheating honest citizens seeking justice in those esteemed courts. DUPONT wants this Court to sanction as to Plaintiffs what it did, to say it is perfectly proper to willfully ignore court orders, to lie to the Court, the opposing party, the jury, to commit perjury and suborn perjury, obstruct justice, commit mail and wire fraud, fabricate evidence, destroy evidence and hide evidence.

This is truly an amazing concept, one with which not a single court in the land has ever agreed. Incredibly, now DUPONT seeks to enlist this Court to assist it in its scheme. Defendants have moved to dismiss Plaintiffs' Complaint under the guise of F.R.C.P. 12(b)(6) on the grounds that the releases signed by the Plaintiffs in the underlying action in which they were defrauded bar their instant actions. Defendants are wrong for four separate reasons:

(1) The language of the releases does not release the fraudulent conduct alleged;

(2) Defendants are collaterally estopped from asserting the release as a bar to Plaintiffs' claims by the final ruling of Judge Elliott;

(3) Federal Common Law will not permit DUPONT to corrupt the federal court system; and,

(4) Under applicable Georgia and federal law, Plaintiffs may rescind and sue for fraud without restoring the settlement monies.

DUPONT, in its instant motion, has not cited a single case on point supporting its quest to have this Court dismiss Plaintiffs' claims. There is no such case. It is a repugnant concept – the antithesis of justice – and, if followed, would make a mockery of our judicial system. But then DUPONT has consistently behaved as if it is above the law of the land. That is the point of this lawsuit.

* * *

D. Federal Common Law Requires Denial of the Motion to Dismiss.

Even if Georgia law supported the Defendants, which it does not, "Federal Common Law" would preclude a finding that these releases bar this action. There is a clear body of law called "Federal Common Law" which is a body of decisional law developed by the federal courts untrammeled by state court decision. *Lyons v. Howard*, 250 F.2d 912 (1st Cir. 1958). A federal court has a responsibility, in the absence of legislation, to fashion federal common law in cases raising issues of uniquely federal concern. *Northwest Airlines v. Transport Workers Union*, 451 U.S. 97 (1981). No one can contest the fact that the integrity of the federal judicial system is a paramount federal concern. Federal common law has been used to determine the effect of a release when important federal issues are involved. The Ninth Circuit Court of Appeals found it appropriate to fashion a uniform federal common law rule to determine the validity of a release in *U.S. v. Northrop*, 59 F.3d 953 (1995). The Plaintiff and Northrop

negotiated a settlement and entered into a release. Subsequently, the plaintiff brought a *qui tam*[7] action based upon the fraud Northrop committed against the U.S in double-charging. Northrop argued that the *qui tam* case was barred by the release in the wrongful discharge case. The Court of Appeals disagreed when it held that the release was unenforceable because its enforcement would impermissibly impair a substantial public policy; namely, that of protecting the United States from fraud.

The *Northrop* court applied the *Rummery-Davies* federal common law test in determining whether the federal common law applied to the case. Under the *Rummery-Davies* test "a promise will be found enforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement". *Town of Newtown v. Rummery*, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987); *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1396 (9th Cir.), cert. denied 501 U.S. 1252, 11 S.Ct. 2892, 115 L.Ed.2d 1057 (1991). The *Northrop* court held that the conditions affecting the validity of release of a significant federal right is eminently a matter of federal law.

The *Northrop* court, in determining to formulate a uniform federal common law, recognized that although state laws may emphasize the same general principles as the federal common law as applied, there was a possibility that state law would overemphasize the interest

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[7] A *qui tam* action is a lawsuit under a statute, which gives to the plaintiff bringing the action a part of the penalty recovered and the balance to the state. The plaintiff describes himself as suing for the state as well as himself.

favoring "ironclad and enforceable general releases" where important federal policies exist. (*Northrop* citing *Winet v. Price*, 4 Cal.App.4th 1159, 1173, 6 Cal. Rptr.2d 554 (1992)). The court held that a federal common law would prevent any conflicts between federal state policies or interests.

In the *Rummery* case which set forth part of the *Rummery-Davies* test, the court concluded that the key factor regarding the enforceability of settlements was whether the agreement involved "merely private rights" or a "broad public interest". In the *Davies* case, the court inquired whether the right that had been waived in the release was by its nature one that implicated a public interest. The next factor in the *Rummery-Davies* test was to determine whether there was a *substantial* public interest that was impaired by the enforcement of the agreement. If the court finds that a substantial public interest exists, a general public interest in settling disputes is not strong enough by itself to outweigh a substantial public interest.

Although the Defendants DUPONT and ALSTON & BIRD argue that there is an interest in the settlement of litigation in the case at bar, that interest cannot by itself outweigh the substantial public interest in protecting the courts from fraud on the other side of the scales. *See, Lockwood, supra,* at 2. Under the *Rummery-Davies* test, the case should go forward. There can be no greater interest than the ability of litigants to rely upon the integrity of the judicial system and rules under which it operates.

i. Federal Statutes Supply the Appropriate Federal Common Law.

Some statutes, such as the Securities Exchange Act of 1934, provide a procedure by which a public interest would not be subverted as the Defendants ask here. In *Goodman v. Epstein*, 582 F.2d 388 (7th Cir. 1978), the court looked at the effect of releases in light of an overriding federal policy or concern.[8] No release should have a blotter effect, *i.e.*, invalidating the protection and integrity of the federal court system. The preservation of the judicial process cannot be hampered by a release of unknown matters. Releases in circumstances like these should go only to mature ripened claims of which the releasing party had knowledge before signing the release.

In the case at bar, the Court should, because of the serious federal interests involved, look beyond Georgia law and recognize federal common law that any release involving actions of fraud before or on a federal court only be released if the claim is ripe and the releasing party knows about it.

ii. Equity and Fairness Will Also Supply the Federal Common Law.

In determining what the federal common law should be in a case like this, the court should look to the policies as set forth in *Creswell v. Sullivan & Cromwell*, 668 F.Supp.

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[8] The Court in *Driscoll* declined to follow the reasoning in *Goodman*. It is suggested that had the fraud in question been found to be an attempt to subvert the integrity of the court itself, the *Driscoll* case would have followed *Goodman*.

166 (S.D.N.Y. 1982) and *Slotkin v. Citizens Casualty Company of New York*, 614 F.2d 301 (2d Cir. 1979). In *Slotkin*, the Second Circuit Court of appeals permitted plaintiffs to maintain in action for fraud without rescinding the settlement of a previous medical malpractice case. The facts of *Slotkin* involved a medical malpractice case in which the defense attorney misrepresented the amount of insurance coverage involved. The plaintiffs settled, relying on the fact there was a limited amount of insurance proceeds available for judgment. After a stipulation of settlement was executed, the plaintiffs discovered that there was $1,000,000 in excess coverage available. The plaintiffs then brought a suit for fraud, and the defendants argued that the suit was barred by the settlement. The Second Circuit court of Appeals held that one who has been defrauded into settling a claim may recover damages without rescinding the settlement. The court held that this rule was sound and that it served to deter fraud. The court further stated that if the cheat can anticipate that the worst that can happen is that he shall be called upon to pay back his profit upon the trade he may be encouraged to defraud. *Slotkin, quoting* C. McCormick, Handbook on the Law of Damages, § 121, at 453 (1935).

The *Slotkin* court described the damages in this type of fraud case as "the difference between the amount which was actually paid on the settlement . . . and the amount which would have been the fair settlement value of the . . . case if plaintiffs have not been deceived. Assuming the parties meant to avoid further litigation and to compromise their dispute and that nothing but true facts were disclosed, how much could plaintiffs reasonably have demanded and the [defendants] reasonably

have allowed as a final compromise? That is the fair settlement value." 614 F.2d at 304, n.2.

The facts of *Creswell v. Sullivan & Cromwell, supra,* are very similar to those of the facts of the case at bar. In *Creswell,* investors brought an action for fraudulent and negligent misrepresentation against a securities company and its attorney to recover damages based on the defendants' failure to produce certain documents in connection with earlier litigation. The investors alleged that had they had the information, they would have obtained greater settlements.

Like DUPONT and ALSTON & BIRD, Sullivan and Cromwell made a motion to dismiss for failure to state a claim upon which relief could be granted. The District Court denied the motion and held that the fraud case involved a claim which did not depend on the merits of the prior action. The claim was that had full disclosure been made, the plaintiffs would have bargained for a greater settlement. In *Creswell,* investors brought an action for fraudulent and negligent misrepresentation against a securities company and its attorneys to recover damages based on the defendants' failure to produce certain documents in connection with earlier litigation. The court denied the defendants' motion to dismiss and stated that:

> [T]he case involves a claim that does not depend on the merits of the prior actions, although the merits of the prior actions are certainly relevant to the claim. The claim is not that had full disclosure been made the plaintiffs would have prevailed. Instead, the claim is that had full

> disclosure been made, the plaintiffs would have bargained for a greater settlement.

Creswell, at 169. The Plaintiffs in the case at bar make the same argument. They are not bringing an action on the underlying products liability claim. Instead, they are bringing a separate and distinct action in fraud.

The *Slotkin* and *Creswell* cases clearly recognized that the importance of finality does not override the importance of deterring fraud in the settlement of lawsuits. Notwithstanding any release or settlement if there was fraud before or upon the court, the defrauded litigant should be able to prove the fraud and receive in damages the benefit from the greater settlement had full disclosure been made and the fraud not taken place.

* * *